



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rotek, Inc.

File: B-240252

Date: October 26, 1990

Timothy S. Kerr, Esq., and Eugene B. Cortese, Esq., Starfield & Payne, for the protester.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency does not possess or have rights in the technical data necessary for a competitive procurement of repair services for battery charger/analyzers, and protester has not shown that performance could be accomplished only with the data available to it, agency has proper basis for finding protester unacceptable and proceeding with a sole-source procurement of the services from the original manufacturer, which has full technical data on the items.

DECISION

Rotek, Inc. protests the proposed sole-source award of a contract to Christie Electric Corporation, under request for proposals (RFP) No. FO4606-89-R-41393, issued by the Department of the Air Force for the repair and maintenance of battery charger/analyzers. Rotek asserts that the Air Force improperly failed to give consideration to its proposal, and that a sole-source award to Christie, the original manufacturer of the charger/analyzers, is not justified, since Rotek is equally capable of performing the required services.^{1/}

We deny the protest.

The RFP called for repair and maintenance services in connection with two models of charger/analyzers, both manufactured by Christie. The solicitation was issued as a proposed sole-source procurement of the services from

^{1/} The Air Force has withheld award pending resolution of this protest.

Christie, but invited other firms to submit offers provided they could demonstrate their technical acceptability. In that regard, clause M-25, "Evaluation of Proposals Submitted Based Upon Data Not Provided in the Solicitation," provided:

"Offers from firms other than those previously identified and listed below [i.e., Christie] may be considered for award only if:

"(a) the offeror identifies the source of the data to be utilized in the performance of this contract . . . , and

"(b) the offeror provides a set of the data to be used in the performance of this contract, and

"(c) the offeror provides evidence that the . . . services proposed will, in fact, meet the Air Force's requirements.

"The foregoing requirement is not a pre-qualification requirement, but since the Air Force lacks the complete data package, or ability to provide facilities, tooling, or materials, it is necessary to determine that the . . . services proposed, which will be performed to the data in the hands of the offeror, will, in fact, meet the instant requirement"

Rotek submitted a proposal which, at the agency's request, the firm supplemented with information concerning its ability to perform as required. After reviewing the entire proposal, however, the Air Force advised the firm that it had not met the requirements of clause M-25, and that the agency intended to proceed with the sole-source acquisition. Rotek then filed its protest with our Office.

Rotek asserts that the information it submitted demonstrates a capability to perform as required by the RFP. Specifically, Rotek notes that, in addition to submitting excerpts from Christie's published operational manual for the devices, it advised the agency that Rotek owns the two models of Christie battery charger/analyzers referenced in the solicitation; has maintained the devices to comply with Federal Aviation Administration (FAA) requirements; has regular sources of supply for repair and replacement parts, which it obtains either from Christie or from that firm's main distributor; and that it has all of the test equipment necessary to service the units.

The Air Force responds that, neither in its initial proposal nor in its response to the agency's requests for additional

information, did Rotek submit any concrete evidence of its ability to maintain the units properly. According to the agency, Rotek's bare assertion that it has maintained the items, absent any supporting documentation, is an inadequate basis for finding the firm technically acceptable, particularly since improper maintenance of the devices on the ground could lead to a critical failure of rechargeable batteries in flight. As to Rotek's assertion that it has maintained the equipment to FAA standards, the Air Force notes a letter from FAA stating that "the FAA does not maintain standards for the repair of ground equipment (i.e., battery charger/analyzers), nor are any required," and that the two Christie battery charger/analyzer models do not appear on any FAA approved repair list maintained by Rotek or its parent, Atlantic Aviation Corporation. (The accuracy of this letter, which was part of the Air Force's formal response to its protest, is not disputed by Rotek.)^{2/} Finally, the Air Force states that the only specific technical data submitted by Rotek pursuant to clause M-25, excerpts from the Christie operational manual, were already in the agency's possession. The agency reports, however, that Air Force technicians had already evaluated the manual and found it inadequate to support a competitive procurement. Consequently, according to the agency, Rotek has failed to satisfy the requirements of solicitation clause M-25, and a sole-source award to Christie is proper.

Generally, under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(1) (1988), a proper basis for a sole-source award exists where only one known responsible source is available to provide the item or service which will satisfy the government's needs. See Hydra Rig Cryogenics, Inc., B-234029, May 11, 1989, 89-1 ¶ 442. In accordance with this principle, a proper basis for a sole-source award exists where adequate data does not exist or is not available to permit conducting a competitive procurement within the time available. Where an agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for the written justification for and higher-level approval of the contemplated sole-source action and publication of the required notice in the Commerce Business Daily (CBD), we will not object to the sole-source award unless it can be shown that there is not a reasonable basis for the award. Id.

The record shows that, prior to issuing the RFP, the agency reviewed the technical data then available to the government

^{2/} Rotek's only comment on the matter is that it is an approved FAA repair station operating under its parent corporation's license. However, this is not at issue.

regarding the charger/analyzers in order to determine whether the data were sufficient to permit repairs in the agency's own repair shops or, in the alternative, whether the data constituted an adequate technical data package to allow prospective contractors other than Christie to perform the work if the services were procured competitively. Based on its review of the available data, which consisted entirely of Christie's published operating manual for the units (the same manual later submitted by Rotek), the Air Force concluded that the technical data were inadequate and that the services could be obtained only from Christie. This decision was based largely on the fact that Christie was the only repository of unpublished, proprietary data concerning all of the components of the charger/analyzers, particularly the circuit board assemblies, which the agency considered necessary to service the units properly.

The record further shows that, subsequent to that determination, the Air Force prepared a formal justification and approval (J&A) of the proposed sole-source procurement which, among other things, indicated that the government lacked the necessary technical data to procure the items competitively, and that Christie was not required to provide the data to the government under its contract to furnish the charger/analyzers. See Federal Acquisition Regulation (FAR) §§ 6.302, 6.303, and 6.304 (procedures to be followed when procuring services from only one known responsible source). Then, as required by FAR § 5.201, the agency published a synopsis of the proposed procurement in the CBD, which led to the submission of Rotek's proposal and the Air Force's evaluation of Rotek's technical data. Finally, the record shows that, upon receipt of Rotek's proposal, the Air Force made several efforts to determine whether Rotek was in fact capable of performing as required. For example, the agency contacted Rotek for amplification of its initial statement that the firm could repair the devices; forwarded the supplemental information that it received from Rotek for review by the office of the government equipment specialist on three separate occasions; and in fact advised technical review personnel that "award cannot proceed (to any party) until all efforts to qualify Rotek have been exhausted." Taken as a whole, these actions on the part of the agency are consistent with the statutory and regulatory requirements for proceeding with a sole-source award on the basis of inadequate data. See Hydra Rig Cryogenics, Inc., B-234029, supra; MMC/PHT Co., -- Recon., B-230599.2, July 27, 1988, 88-2 CPD ¶ 90.

The remaining issue is whether the agency's rejection of Rotek as unacceptable was proper, and whether the proposed sole-source award to Christie therefore is reasonable.

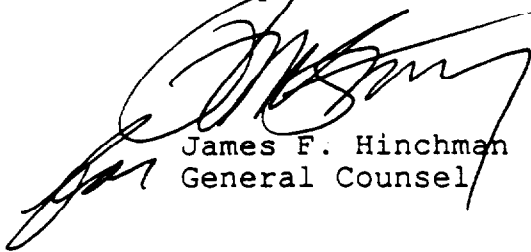
Generally, the contracting agency is responsible for evaluating the information provided by an offeror and ascertaining whether it is sufficient to establish the technical acceptability of its offer, since the contracting agency must bear the burden of any difficulties incurred by reason of a defective evaluation. Crest-Foam Corp., B-234628.3, June 20, 1990, 90-1 CPD ¶ 572. Consistent with this principle, the responsibility for establishing procedures necessary to determine acceptability also rests with the contracting agency, and we will only disturb the agency's determination where it is shown to be unreasonable. Id. Here, the agency has established a procedure, incorporated in clause M-25, that places the burden of demonstrating the capability of performing as required on the offeror. We have approved of the use of the identical clause in the past as a means of soliciting offers from potentially capable offerors in a procurement that would otherwise be limited to only one source due to inadequate government data, and we find its use unobjectionable here as well. See generally, MMC/PHT Co.,-- Recon., B-230599.2, supra. Under clause M-25, an offeror is required to furnish, not only data, but evidence that it can perform. Id. According to the Air Force, however, despite its requests for more information, Rotek has failed to provide repair records or any other documentation that any repairs it performed were done properly, in accordance with the manufacturer's specifications.

Further, although Rotek has provided excerpts from Christie's operating manual and asserted that it can repair the items using only that manual, the agency's position is that more is required. The Air Force states that a knowledge of the complete technical specifications is necessary to be able to diagnose and repair all problems that might arise in the devices, and particularly in the circuit boards themselves. Rotek does not argue that it has such information, but asserts that it is not needed because, in the case of circuit board failure, it is more economical simply to discard the board and replace it with another. The Air Force views this as an oversimplification of what is required to service and maintain the devices. According to the agency, diagnosis of the problem that caused the board to malfunction in the first place is necessary in order to avoid a repetition of the circuit board failure. To be able to perform that diagnosis, according to the Air Force, it is necessary to have the unpublished, proprietary circuit board schematics and other technical data that reside solely with the original equipment manufacturer. Further, according to the agency, Christie makes all repairs to the charger/analyzers at its manufacturing facility and, following completion of repairs, subjects the devices to the same proprietary acceptance test procedures as new production units. Thus, although Rotek asserts that it has adequate testing equipment, since the acceptance test

procedures are proprietary to Christie, the agency states that any test procedures that Rotek might use could not provide the same degree of assurance that its repairs would restore the units to original specifications.

We find that the agency has provided a reasonable explanation of why, without additional technical data, Rotek would not be as qualified as Christie to perform the required work. We therefore find that the agency's assessment of technical unacceptability was reasonable.3/

The protest is denied.



James F. Hinchman
General Counsel

3/ Although we do not object to the award to Christie, the Air Force should continue with its efforts to determine whether the necessary technical data can be obtained and made available to prospective offerors in the future.